

ORIGINAL

EX PARTE OR LATE FILED

JOHN BAVENDER\*  
ANNE GOODWIN CRUMP\*  
VINCENT J. CURTIS, JR.  
RICHARD J. ESTEVEZ  
PAUL J. FELDMAN  
ERIC FISHMAN  
RICHARD HILDRETH  
FRANK R. JAZZO  
ANDREW S. KERSTING\*  
EUGENE M. LAWSON, JR.  
HARRY C. MARTIN  
J. TODD METCALF\*  
GEORGE PETRUTSAS  
LEONARD R. RAISH  
JAMES P. RILEY  
KATHLEEN VICTORY  
HOWARD M. WEISS

\* NOT ADMITTED IN VIRGINIA

FLETCHER, HEALD & HILDRETH, P.L.C.

ATTORNEYS AT LAW

11th FLOOR, 1300 NORTH 17th STREET

ROSSLYN, VIRGINIA 22209-3801

(703) 812-0400

TELECOPIER

(703) 812-0486

INTERNET

office@fhf-telcomlaw.com

FRANK U. FLETCHER  
(1939-1985)  
ROBERT L. HEALD  
(1956-1983)  
PAUL D.P. SPEARMAN  
(1936-1982)  
FRANK ROBERSON  
(1936-1981)  
RUSSELL ROWELL  
(1948-1977)

RETIRED  
EDWARD F. KENEHAN

CONSULTANT FOR INTERNATIONAL AND  
INTERGOVERNMENTAL AFFAIRS  
SHELDON J. KRYSS  
U. S. AMBASSADOR (ret.)

OF COUNSEL  
EDWARD A. CAINE\*  
JOHN JOSEPH SMITH\*  
MITCHELL LAZARUS\*

WRITER'S DIRECT  
703-812-0440

DOCKET FILE COPY ORIGINAL

RECEIVED

NOV 13 1997

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

November 13, 1997

**BY HAND DELIVERY**

Magalie Salas, Esquire  
Secretary  
Federal Communications Commission  
1919 M Street, NW, Room 222  
Washington, D.C. 20554

**Re: Rules and Policies for Local Multipoint Distribution Service and for  
Fixed Satellite Services, CC Docket No. 92-297**

Dear Ms. Salas:

On behalf of Sierra Digital Communications, Inc., I am filing the original and one copy of this letter to accompany the attached written ex parte communication pursuant to Section 1.1206(a)(1) of the Commission's Rules.

Substantially identical letters were also sent to the following:

Mr. Steve Kaminer  
Office of Commissioner Furchgott-Roth

Mr. Peter A. Tenhula  
Office of Commissioner Powell

Ms. Karen Gulick  
Office of Commissioner Tristani

Mr. David R. Siddall  
Office of Commissioner Ness

Copies of the attached letter were sent to:

Mr. John Cimko, Jr.  
Ms. Nancy Boocker  
Mr. John Clark  
David Wye  
Wireless Telecommunications Bureau

1 of 1 Copies rec'd  
DO NOT REFILE

*[Handwritten signature]*

FLETCHER, HEALD & HILDRETH, P.L.C.

Magalie Salas, Esquire  
November 13, 1997  
Page 2

RECEIVED

NOV 13 1997

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Ms. Jane E. Mago  
Ms. Kathleen L. Franco  
Office of Commissioner Powell

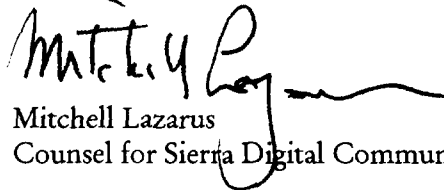
A copy of the letter addressed to Mr. Kaminer will be sent to:

Kevin Martin (as of Dec. 1, 1997)

Kindly date-stamp and return the extra copy of this letter provided.

If there are any questions about this filing, please call me directly at the number above.

Sincerely,



Mitchell Lazarus  
Counsel for Sierra Digital Communications, Inc.

ML:deb

Enclosure

cc: Mr. Ari Fitzgerald  
Mr. Steve Kaminer  
Mr. Peter A. Tenhula  
Ms. Karen Gulick  
Mr. David R. Siddall  
Mr. John Cimko, Jr.  
Ms. Nancy Boocker  
Mr. John Clark  
Mr. David Wye  
Ms. Jane E. Mago  
Ms. Kathleen L. Franco  
Mr. Kevin Martin  
Mr. Hal Tenney

ANN BAVENDER\*  
ANNE GOODWIN CRUMP\*  
VINCENT J. CURTIS, JR.  
RICHARD J. ESTEVEZ  
PAUL J. FELDMAN  
ERIC FISHMAN  
RICHARD HILDRETH  
FRANK R. JAZZO  
ANDREW S. KERSTING\*  
EUGENE M. LAWSON, JR.  
HARRY C. MARTIN  
J. TODD METCALF\*  
GEORGE PETRUTSAS  
LEONARD R. RAISH  
JAMES P. RILEY  
KATHLEEN VICTORY  
HOWARD M. WEISS

\* NOT ADMITTED IN VIRGINIA

**FLETCHER, HEALD & HILDRETH, P.L.C.**

ATTORNEYS AT LAW

11th FLOOR, 1300 NORTH 17th STREET

ROSSLYN, VIRGINIA 22209-3801

(703) 812-0400

TELECOPIER

(703) 812-0486

INTERNET

office@fh-h-telcomlaw.com

FRANK U. FLETCHER  
(1939-1985)  
ROBERT L. HEALD  
(1956-1983)  
PAUL D.P. SPEARMAN  
(1936-1982)  
FRANK ROBERSON  
(1936-1981)  
RUSSELL ROWELL  
(1948-1977)

RETIRED

EDWARD F. KENEHAN

CONSULTANT FOR INTERNATIONAL AND  
INTERGOVERNMENTAL AFFAIRS

SHELDON J. KRYS  
U. S. AMBASSADOR (ret.)

OF COUNSEL

EDWARD A. CAINE\*  
JOHN JOSEPH SMITH\*  
MITCHELL LAZARUS\*

WRITER'S DIRECT  
703-812-0440

November 13, 1997

**BY HAND DELIVERY**

Ari Fitzgerald, Esquire  
Office of Chairman William E. Kennard  
Federal Communications Commission  
1919 M Street NW, Room 814  
Washington DC 20554

**Re: Rules and Policies for Local Multipoint Distribution Service and for Fixed  
Satellite Services, CC Docket No. 92-297 (Ex Parte Communication)**

Dear Mr. Fitzgerald:

Welcome to the eighth floor.

One of the many matters awaiting action by the new Commission is a reconsideration pending in the above docket. On behalf of Sierra Digital Communications, Inc. (Sierra), a party to the proceeding, I am writing with a brief summary of the issues relating to the 31 GHz band. If your schedule permits it, I would appreciate the chance to review the matter with you in person, and to do the same with Chairman Kennard if you agree that is advisable.

**Introduction**

Sierra, the leading U.S. manufacturer of 31 GHz equipment, disputes the Commission's decision to reallocate all of the 31 GHz band to LMDS. The main use of the band is public safety applications. The facts justify, and the law supports, retaining half the band for private licensing. The Commission can accomplish this simply by withdrawing "Block B" from auction, while proceeding to auction "Block A" as planned.<sup>1</sup>

---

<sup>1</sup> Block B is the "outer half" of the 31 GHz band, consisting of 150 MHz total: 31.000-31.075 and 31.225-31.300 GHz. Block A is the middle half of the 31 GHz band (31.075-31.225 GHz) plus another 1,000 MHz in the 28 GHz band. Auction of Local Multipoint Distribution Service, Report No. AUC-97-17-A, DA 97-2081 (released Sept. 25, 1997).

Ari Fitzgerald, Esquire

November 13, 1997

Page 2

Although the Commission is protecting the private 31 GHz licenses that were granted before the release of the Fourth Notice in July 1996,<sup>2</sup> those licenses represent only the bottom knee of a steep "S" curve in demand, chiefly from local and state governments. As the cost of 31 GHz technology has come down over the past few years, its use for public safety applications has increased sharply, and at an increasing rate. Many local and state governments even filed 31 GHz applications after the Fourth Notice proposed reallocating the band to LMDS.<sup>3</sup> As an alternative to retaining Block B for private use, the Commission at the very least should reinstate those applications.

### Background

This proceeding dates back to the early 1990s, when petitioners proposed an allocation of the 28 GHz band for such services as wireless cable and wireless local loop. It has been assumed from the beginning that an LMDS provider will need 1,000 MHz of spectrum. The original intent was for LMDS to share the 28 GHz band with satellite interests, but the Commission eventually had to abandon that idea as technically infeasible.<sup>4</sup> The resulting 28 GHz bandplan left LMDS with 850 MHz of unencumbered spectrum, plus another 150 MHz suitable for hub-to-subscriber use. Believing that was insufficient spectrum for LMDS, the Commission also reallocated all 300 MHz of the 31 GHz band to LMDS.<sup>5</sup>

Sierra does not object to reallocating *half* the 31 GHz band (150 MHz) to LMDS. This gives LMDS its full 1,000 MHz of unencumbered spectrum, plus another 150 MHz for hub-to-subscriber communications, while still leaving 150 MHz for current 31 GHz applications. But reallocation of the *entire* band to LMDS is unsupported by both the facts and the law.

---

<sup>2</sup> The Commission protected incumbent 31 GHz licensees in the Block B portion of the band, and offered similar protection to Block A 31 GHz licensees if they applied promptly to relocate to Block B. Local Multipoint Distribution Service, 6 Comm Reg. 1291 at ¶¶ 85, 91-93 (1997) (Second Report and Order).

<sup>3</sup> Second Report and Order, 6 Comm. Reg. 1291 at ¶ 100.

<sup>4</sup> Local Multipoint Distribution Service, 11 FCC Rcd 19005, 19014-16 (1996) (Fourth Notice).

<sup>5</sup> Second Report and Order, 6 Comm. Reg. 1291 at ¶ 36.

Ari Fitzgerald, Esquire  
November 13, 1997  
Page 3

### Issues

- **Nothing in the record supports giving more than 1,000 MHz of spectrum to LMDS.** The Second Report and Order gave LMDS a total of 1,150 MHz unencumbered spectrum, plus another 150 MHz for hub-to-subscriber use. But LMDS has never been able to show a need for more than 1,000 MHz, despite Sierra's repeated challenges on this issue. An allocation in excess of 1,000 MHz unencumbered spectrum is unsupported by the record.
- **The Commission has consistently underestimated the private use of 31 GHz.** The Commission based its original proposal to reallocate the 31 GHz band in part on its belief that there were only 27 licensees in the band.<sup>6</sup> After Sierra and others contested that claim, the Second Report and Order raised the estimate several-fold, to 86 licensees operating 122 stations.<sup>7</sup> Sierra believes this estimate continues to be low.
- **The Commission has wrongly overlooked the exponential growth in private use of 31 GHz.** The Commission has never acknowledged data in the record that shows rapidly-increasing growth at 31 GHz, and has similarly failed to acknowledge well-supported projections of future growth.<sup>8</sup> Yet LMDS's claims of spectrum need are based solely on growth projections that lack any support in historical data. To give full credence to unsupported LMDS growth projections, while ignoring actual data on growth of private 31 GHz use, is arbitrary and capricious.

---

<sup>6</sup> Fourth Notice, 11 FCC Rcd at 19079.

<sup>7</sup> Second Report and Order, 6 Comm. Reg. 1291 at ¶ 47.

<sup>8</sup> Sierra has repeatedly documented past growth and future projections in the band. Most recently, *see* Letter from Mitchell Lazarus to John Cimko, Jr. and Nancy Boocker (filed Aug. 14, 1997); Petition for Partial Reconsideration of Sierra Digital Communications, Inc. at 6-9 (filed May 5, 1997) (Sierra Petition).

Ari Fitzgerald, Esquire

November 13, 1997

Page 4

- **Most of the private use at 31 GHz is for public safety applications.** More than 70% of transmitters in the band are dedicated to governmental systems, hospitals, schools, traffic control and monitoring systems, and other public safety uses.<sup>9</sup> These applications are entitled to a high level of public interest consideration.
- **The fact that 31 GHz private users do not receive interference protection from one another does not support reallocating the band.** The U.S. Court of Appeals for the District of Columbia has held squarely that a service's unprotected character does not excuse the Commission from considering its public interest.<sup>10</sup> (The Commission properly declined to rely on this argument in promulgating the challenged rules.)
- **Typical public safety users can neither take service from commercial providers nor relocate to other bands.** A prudent governmental agency cannot entrust its vital public safety communications to a commercial provider that is free to withdraw capacity or deny renewal if a more profitable customer comes along. Nor does a governmental entity have the means to raise the capital necessary to bid on spectrum.<sup>11</sup> Sierra has shown in detail that the available bands below 31 GHz are technically unsuitable for many of the applications in the band, particularly traffic signal control, while equipment in the bands above 31 GHz is too expensive for these applications.<sup>12</sup>

---

<sup>9</sup> Sierra Petition at 9-12. Filings in support of Sierra's positions were submitted by, for example, Parsons Transportation Group Inc. (supporting Nevada Dept. of Transportation) (filed June 2, 1997); Sunnyvale GDI (filed May 15, 1997) (supporting several public safety users); VideoLinx, Inc. (filed May 12, 1997) (same); Institute of Transportation Engineers (filed Sept. 9, 1996); Nevada Dept. of Transportation (filed Sept. 5, 1996); International Municipal Signal Ass'n (filed Aug. 22, 1996); City of Palm Springs, California (filed Aug. 15, 1996); City of Topeka, Kansas (filed Aug. 13, 1996); City of San Diego, California (filed Aug. 12, 1996); City and County of Honolulu, Hawaii (filed Aug. 9, 1996); City of Long Beach, California (filed Aug. 9, 1996); and State of California (Mobile Source Air Pollution Reduction Review Committee of the South Coast Air District) (filed Aug. 2, 1996).

<sup>10</sup> H&B Communications Corp. v. FCC, 420 F.2d 638 (D.C. Cir. 1969).

<sup>11</sup> Sierra Petition at 12-14.

<sup>12</sup> See Letter from Mitchell Lazarus to Jackie Chorney (filed Aug. 14, 1997).

Ari Fitzgerald, Esquire

November 13, 1997

Page 5

- **The Commission can easily prevent unfair competition.** If the Commission is concerned about 31 GHz private licensees competing unfairly with LMDS providers that use auctioned spectrum, it can eliminate this risk simply by prohibiting sale and resale in the private 31 GHz band.
- **In the alternative, the Commission should reinstate the previously pending applications at 31 GHz.** As noted above, several new 31 GHz applicants filed even after the proposed reallocation of the band to LMDS. The Second Report and Order dismissed these applications wholesale, even though it acknowledged this action would "create unexpected disruptions and expenses."<sup>13</sup> At the very least, the Commission should reinstate these applications and grant them the same protections as incumbent licenses. This would satisfy some of the most urgent public safety communications needs with only a slight additional burden to LMDS.
- **In any event, the Commission should rescind its new frequency tolerance as to 31 GHz.** The 0.001% tolerance specified for LMDS is inappropriate for 31 GHz.<sup>14</sup> The change would raise the cost of equipment by a factor of two to three, placing it of reach of many public safety agencies, and at least in this band will not promote its intended purpose of facilitating frequency coordination across BTA boundaries.<sup>15</sup> Moreover, the change in tolerance promulgated in the Second Report and Order is unlawful as to the 31 GHz band, because it was never published as a rulemaking proposal.<sup>16</sup> Finally, Sierra's request to rescind the tolerance at 31 GHz is unopposed.<sup>17</sup>

---

<sup>13</sup> Second Report and Order, 6 Comm. Reg. 1291 at ¶ 101.

<sup>14</sup> 47 C.F.R. § 101.107 (as amended). See Second Report and Order, Appendix A.

<sup>15</sup> See Sierra Petition at 18-20; Letter of Mitchell Lazarus to Suzanne Toller (filed Sept. 10, 1996), *citing* attached letter of Drew Lance, Chairman and CEO, Sierra Digital Communications, Inc. to Mitchell Lazarus (Sept. 6, 1996).

<sup>16</sup> Sierra Petition at 20-21.

<sup>17</sup> In the alternative, the Commission should postpone the 0.001% requirement as to 31 GHz frequencies for two years. This will enable users to build out at least part of their

Ari Fitzgerald, Esquire  
November 13, 1997  
Page 6

**Conclusion**

The Commission can meet all of LMDS's documented spectrum needs, while also maintaining adequate spectrum for 31 GHz public safety applications, by withdrawing "Block B" from auction. In the alternative, the Commission should at least grant the applications pending at the time of the Second Report and Order. Regardless of its other actions, the Commission should rescind the 0.001% frequency tolerance as to 31 GHz.

I look forward to discussing these issues with you in person, and will call for an appointment in a few days.

Respectfully submitted,



Mitchell Lazarus  
Counsel for Sierra Digital Communications, Inc.

ML:deb

cc: Office of the Secretary -- 2 copies

Mr. John Cimko, Jr., Chief  
Ms. Nancy Boocker, Deputy Chief  
Policy Division, Wireless Telecommunications Bureau

Mr. John Clark, Deputy Chief, Private Wireless Division  
Wireless Telecommunications Bureau

Mr. David Wye, Wireless Telecommunications Bureau

Mr. Hal Tenney, Sierra Digital Communications, Inc.

---

planned systems with affordable equipment. Realistically, even if the tighter requirement were ever to serve a useful purpose in minimizing interference across BTA boundaries, it is unlikely to be needed for at least two years.